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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~330~~ 14

RALPH CONTI and DAVID NEWMAN,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated New York, July 8, 1966.

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Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

RALPH CONTI and DAVID NEWMAN, Petitioners,

against

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Ralph Conti and David Newman, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 1, 1966.

Opinion Below

The opinion of the Court of Appeals, as yet unreported, is printed as Appendix A annexed to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on June 1, 1966. Petitioners' timely petition for rehearing was denied on June 28, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 22(2).

Questions Presented

1. Do not the federal wagering tax statutes here involved violate the petitioners' privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this Court especially in view of its recent decision in *Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70, overrule *United States* v. *Kahriger,* 345 U. S. 22 (1953), and *Lewis* v. *United States,* 348 U. S. 419 (1955)?

This is the question on which this Court recently granted certiorari in *United States* v. *Costello,* 352 F. 2d 848 (2d Cir. 1965), cert. granted 383 U. S. 942 (1966), 86 S. Ct. 1195.

2. Is the search warrant valid where, as here, it charges only a violation of 26 U.S.C. § 7272, i.e., a failure to register under the federal wagering statute, 26 U.S.C. 4412, and where the sole supporting affidavit sets forth reasons for believing only that there was a failure to pay the special occupational tax (i.e., a violation of 26 U.S.C. § 7271, for failure to comply with 26 U.S.C. § 4411), but does not mention any grounds for believing that there was a failure to register?

3. Is the search warrant valid where those parts of the supporting affidavit dealing with (i) investigation of a telephone number used for taking bets and (ii) search of the Internal Revenue Service records for proof of non-payment of the occupational stamp tax, are hearsay, and no source of the information is stated and no date is given as of when the investigation or the search was made?

4. Does the supporting affidavit for the search warrant state sufficiently, or at all, the dates when the horse bets were placed over the telephone?

5. May the fruits of a search be used to convict where the federal agents in executing a warrant to search a street floor apartment in a multiple dwelling, did so by opening and entering through the street door of the building, going through the vestibule, opening and entering through the

vestibule door, going into and through a hallway to the rear of the ground floor opposite the apartment, and then trespassing by opening the door to a landing at the head of a stairway leading to the cellar, entering upon the landing and concealing themselves there behind the door? The landing, the cellar stairs and the cellar were not accessible even to tenants of the building and the door was customarily kept locked.

6. Was 18 U.S.C. § 3109 violated where, at the moment petitioner Conti opened the door of the apartment, the agents rushed from their above-described place of concealment behind the cellar stairway door, and while shouting "Federal Agents with a search warrant," continued full speed without any pause at all past Conti through the open door into the apartment?

Constitutional and Statutory Provisions and Regulations Involved

Question 1 involves the Fifth Amendment of the United States Constitution and the wagering tax laws 26 U.S.C. §§ 4401, 4411, 4412, which are set forth in Appendix E at pp. 40-41 below.

Question 2 involves the Fourth Amendment of the United States Constitution and two of the above wagering tax laws, namely, 26 U.S.C. §§ 4411 and 4412 and also 26 U.S.C. §§ 7271 and 7272 and Federal Tax Regulations 26 C.F.R. 44.4412-1, 44.6071-1(b)1, 44.6151-1, and 44.4901-1(a) and (c). These are set forth in Appendix E at pp. 40-45 below.

Questions 3 and 4 involve the Fourth Amendment of the United States Constitution, and Rule 41(e)(2) of the Federal Rules of Criminal Procedure, which are set forth in Appendix E, at pp. 40 and 45 below.

Questions 5 and 6 involve 18 U.S.C. § 3109 and Rule 41(e)(5) of the Federal Rules of Criminal Procedure, which are set forth in Appendix E at pp. 40 and 45 below.

Statement of the Case

(Numerals followed by the letter "a" are page references to petitioners' appendix below, certified to this Court)

Federal special agents conducted a surveillance covering Apartment B, 1582 First Avenue, New York City, on January 20 and 21, 1964.* On January 22, 1964, Special Agent, David A. Ostrager (who had not participated in the surveillance) obtained from U. S. Commissioner

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* The apartment in question, Apartment B, was in the rear of the ground floor of a modernized apartment building, between 81st and 82nd Streets, New York City. An unlocked door led from the street into a first hallway which contained mail boxes, bells and an inter-com system which connected to the various apartments. A second door led into an inner hallway. This door was locked and could only be opened by a key or a push-button buzzer released by a tenant (148a). The managing agent had given orders that this door leading to the inside hall should be kept locked at all times (151a).

At the rear of the ground floor hallway, about four feet from the door of Apartment B, and almost facing it, was another door at the head of a flight of steps, leading to the cellar. This door was regularly kept locked and even tenants had no right of access to the stairway or cellar (151a).

Each tenant had a key to the inner vestibule door in addition to the key to his apartment. The vestibule door was locked when the agents first approached it on January 20th, 1964, but Agent Cotter managed to enter it behind one of the tenants (124a). On and after January 21, 1964, Agent Riley used his own keys to open it (108a-109a).

The inner halls and stairways were for the exclusive use of the tenants in the building and their guests or others with authorized business. The agents entered the inner hallways solely for the purpose of surveillance. They were not invitees or even permittees. They disclaimed all contact with the superintendent, the owner or any other person who might have given them permission to enter (111a). During the three days of this investigation, January 20 to 22, 1964, the agents stayed for long periods of time on the landing behind the door at the head of the cellar steps, with the door at times open one-eighth of an inch to a quarter of an inch. They listened at the door of Apartment B for telephone calls and physically affixed hidden seals on the apartment door when they discontinued surveillance each evening.

Bishopp a warrant to search said apartment. His supporting affidavit (12a-13a) stated as the probable cause for issuance of the warrant the following (13a):

> "And the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: testimony of a Special Agent of the Internal Revenue Service; who: 1) placed horse bets by telephoning number TR 9-2265; 2) that investigation has disclosed that the telephone number is installed at Ground Floor Apartment B at 1582 First Avenue, New York, New York; 3) that a search of the records of the Internal Revenue Service reveal that none of the persons residing at the aforementioned address have paid the Special Tax imposed by Title 26, United States Code, Section 4411; and 4) that wagers were placed by the Special Agent on January 20, 21, 1964."

The affidavit charged (12a) that the gambling paraphernalia so sought was being used as a means of conducting a wagering business in violation of 26 U.S.C. §§ 4401, 4411, 4412 and 7272. The warrant contains the same charge, verbatim (14a).

Thus the only criminal statute referred to was § 7272, which makes it a crime to fail to register (Appendix E, annexed hereto, p. 43). There is no reference in the affidavit or in the warrant to § 7262, the criminal statute which makes it a crime to fail to pay the special occupational tax (Appendix E, p. 43). The statement of probable cause, above quoted, alleges a search of the IRS records which reveals non-payment of the special occupational tax. Nowhere is there a word about search of any records to ascertain whether there was a failure to register.

Carrying this warrant, two of the agents who were conducting the surveillance (Agents Cotter and Reilly) entered the apartment house some time prior to 4 p.m. on January 22, 1964, going through the outer door, the

vestibule door and the hallway to the ground floor rear where Apartment B was situated. Whether they had to use keys on this occasion is not clear in the record although in going in on other occasions during the three days of surveillance, Agent Reilly admittedly (108a-109a) used his own keys to gain an entrance.

Once in the rear hallway these agents, instead of seeking entrance to search Apartment B, which they had now reached, opened the door about four feet away and entered upon the landing at the head of the flight of stairs leading to the cellar. This door was regularly kept locked and even tenants had no access to the stairway or cellar (151a). The agents closed the door, except for a thin crack, and remained concealed behind it on the landing and upper steps.

At about 4 p.m. petitioner Conti came along the hallway and opened the door to Apartment B with a key. As he stood at the open door withdrawing the key, Agent Cotter rushed out of his hiding place and while shouting "Federal Agents with a search warrant" went as fast as he could and without any pause at all through the open door past Conti into the apartment.

Petitioner Newman was in the room sitting at a desk telephoning. Bet slips, odds sheets, U. S. currency and other gambling paraphernalia were seized. Petitioners were subsequently indicted and after a jury trial, were convicted. The fruits of the search were admitted in evidence and were a substantial, perhaps the main, factor in securing the conviction.* A pre-trial Rule 41(e) motion to suppress was unsuccessful (16a-57a). Objections to ad-

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* The papers seized in the search were put in evidence (Exhs. 10-19), were identified by agent Cotter as horse bet slips, etc., and furnished the only computation of the income on which the excise tax was unpaid (Tr. 273). A government expert identified the handwriting on some of these papers as defendant Newman's (Tr. 367-370), on others as defendant Conti's (Tr. 377-379), and on some as the writing of both (Tr. 381-383).

mission in evidence of the seized property were duly made at the trial (e.g., 65a, 81a-82a, 83a, 112a, 113a, 114a, etc.).

The indictment (8a-11a) was in five counts as follows:

1) Willful attempt (§ 7201) to evade paying the 10% excise tax imposed by § 4401.
2) Willful failure (§ 7203) to file the excise tax return required by § 4401.
3) Willful failure (§ 7203) to pay the special tax imposed by § 4401.
4) Willful failure (§ 7203) to pay the special tax imposed by § 4411.
5) Willful failure (§ 7203) to register as required by § 4412.

Petitioner Conti was convicted on all five counts. Petitioner Newman was convicted on the last four; as to him the jury disagreed on the first count.

Reasons for Granting the Writ

1.

With respect to question 1, the same point is now before the Court in *Costello* v. *United States, certiorari* granted March 22, 1966, 383 U. S. 942 (1966), 86 S. Ct. 1195. As the opinion below indicates (Appendix A, p. 28; and see also 114a and Appendix F, p. 49) this constitutional point has been kept open by petitioners for review, with the Second Circuit Court adhering to its decision in *Costello*. All five counts of the indictment (8a-11a) are based on one or another of the wagering tax statutes, 26 U.S.C. §§ 4401, 4411, and 4412. Without burdening the Court with further argument, we respectfully request that the petition be granted permitting question 1 to be reviewed along with the review in *Costello*. The pertinent New York gambling statutes are Penal Law, §§ 973, 986 and 986-c (Appendix E, p. 45).

2.

On question 2, we have pointed out that the search warrent (14a-15a) and affidavit (12a-13a) charged only a viola-

tion of criminal statute § 7272, a failure to register (Appendix E, p. 43). The supporting affidavit on the other hand in stating probable cause for issuance of the warrant alleges only a failure to pay the special occupational tax. Failure to pay is a breach of § 7262 (Appendix E, p. 43). Section 7262 itself, however, is nowhere mentioned in the warrant or the affidavit. There is no attempt in the affidavit to show that there was a failure to register. Thus, the only criminal charge made in the affidavit and the warrant, i.e., breach of § 7272, is not supported in any way by a showing of probable cause. Our contention is that the constitutional requirement of probable cause is not met (Fourth Amendment, Appendix E, p. 40).

The Circuit Court decided (Appendix A, p. 20) that payment of the occupational tax, and registering, are effected at the same time by filing Form 11-C and "the same information which indicated failure to pay the occupational tax in this case also indicated failure to register".* This

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* The statutes themselves (§§ 4411 and 4412) do not require simultaneous registration and payment of the special $50 tax. The Regulations, presumably for convenience of administration, have combined in the single Form 11-C, both the registration statement and the Special $50 tax return (Reg. § 44.4412-1); and require the special $50 tax to be paid with the special $50 tax return (Reg. § 44.6151-1). There is no relationship between the registration statement, as distinguished from the tax return, and the $50 payment. In any event the resulting simultaneity is an attempt by regulation to add to the statutes something which is not there. The attempt is without effect even in federal gambling tax law. *United States* v. *Calamaro*, 354 U. S. 355 at 358-359, 77 S. Ct. 1138 at 1143. So the IRS might be compelled to accept a registration without, or prior to, a tax return. In any event the Regulations have no extra-statutory effect in non-tax law such, for example, as bankruptcy law. *In re Quakertown Shopping Center, Inc.*, 248 F. Supp. 749, at 752 (E. D. Pa. 1965). *A fortiori* they are without effect in the law governing probable cause for search warrant where the requirement is of Constitutional origin. If knowledge of the regulations is to be ascribed to the Commissioner so that he may be presumed to draw the inference, he must also be presumed to know the statutory and decisional law under which the regulation requiring simultaneity is without effect.

is equivalent to holding that the constitutional requirement of probable cause may be satisfied by inference and seems to be contrary to what this Court held in *Sgro* v. *United States* (1932), 287 U. S. 206 at 210, where the stale supporting affidavit was successfully attacked.

In so deciding, the Circuit Court conceded (Appendix A, p. 20) that a prior unreported District Court decision in the Southern District of New York, *United States* v. *Paul Tripodi,* Nov. 14, 1962, Clerk's Index 62 Cr. 655, involving a similar inconsistency, had reached the opposite conclusion and had suppressed the seized property.

We respectfully submit that *Tripodi* is right, in keeping with this Court's decision in *Sgro,* against allowing probable cause to be found by inference only. If a warrant is to issue based solely on a criminal charge of failure to register, the supporting affidavit should show that failure, and not rely on showing a failure to pay, a fact from which the failure to register can be reached, if at all, only by inference.

Assuming that the inference is permissible, clearly the Commissioner never in fact drew any such inference but signed the warrant in a routine way. This is obvious from the long series of unreported decisions in the Southern New York District Court, vacating warrants signed by the same Commissioner.*

* In *Rubicco* v. *Williams,* S.D.N.Y., Civ. 118-279, 9/12/58, Murphy, D. J., the same Commissioner signed a warrant later held void because based on an affidavit that failed to show any search of the records at all, to show either lack of registration or lack of payment. In the very recent *United States* v. *Vicini, et al.,* 65 Cr. 336, Tyler, D. J., S.D.N.Y. February 4th and March 4th, 1966, the same Commissioner signed a warrant later held void because based on an affidavit that wholly omitted any date of observation. In like manner dates were omitted from the supporting affidavits in *U. S.* v. *Paul Tripodi,* S.D.N.Y., 62 Cr. 655, 11/14/62, Metzner, D. J.; *Tripodi* v. *Morgenthau,* 213 F. Supp. 735 (Metzner, D. J., 1962); *Nannariello* v. *Morgenthau,* S.D.N.Y., M-18-65, 4-28-65, Wyatt, D. J.; *Tripodi* v. *Morgenthau,* S.D.N.Y., M-18-65, 5-10-65, Wyatt, D. J. In all of these the warrants issued by the same Commissioner were held void. It seems pure fantasy to think that this Commissioner would or could draw the nice inference that the Second Circuit relies on to validate the search warrant.

3 and 4.

In Questions 3 and 4 petitioners challenge the sufficiency of the supporting affidavit on which the search warrant was issued. The only showing of probable cause in the affidavit was as follows (13a):

> "And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: Testimony of a Special Agent of the Internal Revenue Service: who: 1) placed horse bets by telephoning Tr—9-2265; 2) that investigation has disclosed that this telephone number is installed at Ground Floor Apartment B at 1582 First Avenue, New York, New York; 3) that a search of the records of the Internal Revenue Service reveal that none of the persons residing at the aforementioned address have paid the Special Tax imposed by Title 26 United States Code, Section 4411; and 4); that wagers were placed by the Special Agent on January 20, 21, 1964."

The statement of probable cause is insufficient because (i) no date is given as the date when the horse bets in item 1) were made; (ii) no date is given in item 2) showing when the investigation of the telephone number at Apartment B was made; and (iii) no date is given in item 3) showing when the search of the IRS records was made. The omission of these three vital dates makes the affidavit insufficient under the ruling in *Sgro* v. *United States* (1932), 287 U. S. 206, 53 S. Ct., 138.

The Court below stated that the dates of the horse bets were given as January 20 and 21, 1964, because, said the Court, the wagers in item 4) are the same as the horse bets in item 1).

There is absolutely nothing to indicate that these "wagers" were the "horse bets" first referred to, or even that these "wagers" were horse bets at all or were made by phone. The choice of the different word "wagers" to de-

scribe them would, if anything, indicate that they were not horse bets at all. If they were, there would be no occasion to use another term, the term "wagers," since that term includes policy bets or numbers. The affiant does not even refer to "the" wagers, as he would naturally have done if he had meant to convey the notion that the "wagers" referred to were the "horse bets" previously mentioned.

With respect to the investigation of the telephone number in Apartment B, there is no date given and nothing to indicate that it was current. The ownership, control, occupancy and leasing of the apartment as well as the telephone listing might have changed or been discontinued. We are not told who made the investigation. Obviously, it was not the affiant since he studiously avoids giving himself as the source (see remarks of Mr. Justice Douglas, in *United States* v. *Ventresca* (1965), 380 U. S. 102, 85 S. Ct. 741 at p. 751). Was the unnamed investigator qualified to make the investigation? Who ascertained the location of the telephone and how? From what source? Was inquiry made of the telephone company or not?

There is nothing to indicate when the search of the IRS records was made. No date is given. Here again the search was evidently not made by affiant for he avoids naming himself as the searcher. How then was it made? Was the search made in the proper office? Against what names was it made? Who were the persons residing in the apartment house? Would the searcher know their names? If so, how? How would he know his list of names, if any, was current and correct?

We are thus left with two vital statements, items 2) and 3) of the affidavit, both hearsay and with absolutely no source given by affiant for his information. We are given none of the corroborative information required to make the hearsay credible. *Jones* v. *United States* (1960), 362 U. S. 257, 269, 80 S. Ct. 725, 735.

We also have three fact assertions in items 1) 2) and 3) of the affidavit for which the dates are completely omitted. As was stated in *Sgro, supra,* 287 U. S. at page 210, the Fourth Amendment to the United States Constitution "should be liberally construed in favor of the individual", and the proof of facts must be "so closely related to the time of the issue of the warrant as to justify finding of probable cause at that time." Further, 287 U. S. at page 211, holds that the determination of probable cause "as of that time, cannot be left to mere inference or conjecture."

5.

This Court now holds for the first time that execution of a search warrant commencing with what it calls a "technical" trespass, is permissible. The citations relied upon by the Court (Appendix A, p. 23) are not applicable to the facts at bar. Those decisions deal only with (i) the *lobby* in a multiple dwelling; *U. S.* v. *Miguel,* 340 F. 2d 812 (C. A. 2), cert. den. 382 U. S. 810 (1965), rehearing den. 382 U. S. 912 (1965); and (ii) the hallways in a multiple dwelling leading *directly* to the apartment in question; *U. S.* v. *Buchner,* 164 F. Supp. 836 (D.C.D.C.), aff'd per curiam 268 F. 2d 891 (D. C. Cir. 1958), cert. den. 359 U. S. 908 (1959), and *U. S.* v. *St. Clair,* 240 F. Supp. 338 (S.D.N.Y. 1965).

The result in those decisions might be justified by necessity since otherwise the apartments in multiple dwellings could be turned into a modern form of medieval sanctuary against arrest or search. But here the agents went far beyond the necessities of the search warrant. At the most, the warrant permitted them to go through the outside doors into the hallway and through the hallway directly to Apartment B in order to search it. They departed from that course. They opened the doorway to a flight of stairs leading down to the cellar. This doorway was kept locked, and was not accessible even to tenants (151a, 152a). The agents went in upon the stairway landing and hid behind the door. This was plain trespass

and not "technical" at all. No case cited in the decision, and no case that we are aware of, has attempted to justify such an action.

The Second Circuit Court now declares such trespasses permissible. This may be the opening of Pandora's box. At least the Court should have stated the complete facts in accordance with our request in the petition for rehearing (Appendix C, pp. 32-33). As the decision now reads, these facts of record are not made clear and the reader of the decision is left to suppose that only the "semi-public" lobby and hallway to the subject apartment are involved.

What the Court below has decided on this point is, in any event, at variance with what this Court, by Mr. Justice Jackson, said in *McDonald* v. *U. S.*, 335 U. S. 451, 458-59 (1948).

Moreover, similar illegal encroachment, in a different context of course, was condemned by this Court in the recent *Miranda* v. *State of Arizona* (6/13/66), 34 LW 4521, at 4528:

> "Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that 'illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.' Boyd v. United States, 116 U. S. 616, 635 (1886)."

and at page 4534:

> "Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." Olmstead v. United States, 277 U. S. 438, 485 (1928) (dissenting opinion).

6.

With respect to question 6, 18 U.S.C. § 3109 (Appendix E, p. 40) provides that an agent may execute a search warrant by breaking in "if, after notice of his authority and purpose, he is refused admittance."

The Second Circuit now holds (Appendix A, p. 24) that "breaking" as used in § 3109 means only a "forcible" entry, citing its own two prior decisions: *United States* v. *Monticallos,* 349 F. 2d 80 (C. A. 2, 1965) and *United States* v. *Garnes,* 258 F. 2d 530 (C. A. 2, 1958), cert. den. 359 U. S. 937 (1958). Neither of these last two cases stands for such a proposition. *United States* v. *Monticallos,* involved a non-warrant narcotics arrest on probable cause, with incidental search and simply held (p. 82) that the question of unlawful entry was not raised below and could not be considered. *United States* v. *Garnes* also involved a non-warrant narcotics arrest on probable cause, with incidental search and the question of entry was not considered or even mentioned.

The present decision is therefore the first decision on this point in the Second Circuit. Since the door to Apartment B was open, the Court holds that there could be no "breaking" and therefore no necessity for the agent to wait a reasonable time for either permission to enter or refusal of entry.*

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* The opinion below states that Agent Cotter "walked" into the apartment (Appendix A, p. 23). Actually, simultaneously with announcing his identity and purpose and without any pause whatsoever, Cotter *rushed* past Conti as fast as he was able, through the open door (Testimony of Reilly 105a-106a; testimony of Cotter 122a). We attempted, without avail, in our petition for rehearing (Appendix C, p. 31) to have the Court below correct this factual error. The method of entry was not "entirely peaceable" as the Court labelled it (Appendix A, p. 24). Rather, it resembles the method of entry held illegal in *Hair* v. *United States,* 289 F. 2d 894, 897 (D. C. Circuit, 1961).

This decision is in direct conflict with two District of Columbia Circuit Court decisions and one 9th Circuit Court decision which hold that any non-permissive entry is "forcible".

Keiningham v. *United States,* 287 F. 2d 126 (D.C. Cir. 1960), at page 130:

> "We think that a person's right to privacy in his home (and the limitation of authority to a searching police officer) is governed by something more than the fortuitous circumstances of an unlocked door, and that the word 'break' as used in 18 U.S.C. § 3109, means 'enter without permission.' We think that a 'peaceful' entry which does not violate the provisions of § 3109 must be a permissive one and not merely one which does not result in a breaking of parts of the house."

Hair v. *United States,* 289 F. 2d 894 (D.C. Cir., 1961), at page 897:

> "The record in this case does not disclose whether the door to Hair's home was locked, closed but unlocked or merely left ajar. But even if we were to assume that the door was left open, only the sheerest sophistry would describe as 'peaceable' the charge of three police officers with drawn weapons across the threshold of a home."

Munoz v. *United States,* 325 F. 2d 23 (9th Cir. 1963), at page 26:

> "While it is true that the officers did not break open the door to appellant's room, we believe that the entry into his room by a passkey obtained from the clerk of the hotel amounts to the same thing. It is clear from the quoted testimony of Agent Fahey that the knock on the door and the announcement by Agent Lang, and

> the entry, were practically instantaneous. Entry to the appellants' room in the manner described completely ignores and destroys the reasons for and the purposes behind the provisions of the above quoted section [§ 3109]."

The resolution of this conflict between the decisions of the District of Columbia and 9th Circuits, and the Second Circuit, is of immense importance, for it is clear that if the word "forcibly" as used in § 3109 covers the non-permissive entry made here, the warrant was illegally executed.

In *Wong Sun* v. *United States* (1963), 371 U. S. 471, at 482, 83 S. Ct. 407, at 414, this Court held:

> "We noted in that case (Miller v. U. S., 357 U. S. 301, 78 S. Ct. 1190, 2 L. Ed. 2d 1332), that the lawfulness of an officer's entry to arrest without a warrant 'must be tested by criteria identical with those embodied in 18 U.S.C. Sec. 3109, which deals with entry to execute a search warrant.' 357 U. S., at 306 (78 S. Ct. 1194). That statute requires that an officer must state his authority and his purpose at the threshold, and be refused admittance, before he may break open the door."

To the same effect: *Miller* v. *United States*, 357 U. S. 301 at p. 313, 78 S. Ct. 1190, 1197.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM T. GRIFFIN,
Counsel for Petitioners.

Appendix A.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 289—September Term, 1965.

(Argued March 24, 1966 Decided June 1, 1966.)

Docket No. 30114

UNITED STATES OF AMERICA,

Appellee,

—v.—

RALPH CONTI and DAVID NEWMAN,

Appellants.

Before:

WATERMAN, MOORE and FEINBERG,

Circuit Judges.

Appeals from judgments of conviction for willful failure to comply with federal wagering tax statutes, in violation of 26 U. S. C. §§7201 and 7203, entered on jury verdicts of guilty after trial in the District Court for the Southern District of New York, John M. Cannella, *Judge*. Affirmed.

WILLIAM T. GRIFFIN, New York, N. Y. (James F. Hart and Dorsey, Burke & Griffin, New York, N. Y., with him on the brief), *for the appellant Conti.*

Appendix A.

IRWIN KLEIN, New York, N. Y., *for the appellant Newman.*

MICHAEL W. MITCHELL, Assistant United States Attorney (John E. Sprizzo, Assistant United States Attorney, and Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., with him on the brief), *for the appellee.*

MOORE, *Circuit Judge*:

Appellant Ralph Conti was convicted of willfully evading payment of the federal excise tax on wagering imposed by 26 U. S. C. §4401, in violation of 26 U. S. C. §7201; willfully failing to file a wagering excise tax return, in violation of 26 U. S. C. §§7203, 4401, 6071, and 6061; willfully failing to pay the excise tax on wagers, in violation of 26 U. S. C. §§7203 and 4401; and engaging in the business of accepting wagers without paying the tax imposed by 26 U. S. C. §4411 and without registering with the District Director of Internal Revenue as required by 26 U. S. C. §4412, all in violation of 26 U. S. C. §7203. Appellant David Newman was charged with the same offenses and convicted of all but the first, as to which charge the jury disagreed.

I. *The Legality of the Search of the Apartment.*

After Special Agent Nicholas Treretola of the Internal Revenue Service placed a bet in a call to a telephone located in Apartment B, 1582 First Avenue, New York, New York, the Internal Revenue Service placed the apartment under surveillance for a few days, observed Newman and Conti coming in and out of the apartment, and placed more

bets over the phone. On January 22, 1964, a United States Commissioner issued a warrant for the search of the apartment, upon the affidavit of Special Agent David Ostrager. The warrant was executed the same day while Conti and Newman were in the apartment. Both men were arrested and a variety of bet slips, odds sheets, racing programs, and the like were seized.

Appellants moved to suppress the fruits of this seizure before trial. Judge Weinfeld denied the motions in an opinion reported at 232 F. Supp. 1004 (S. D. N. Y. 1964). The fruits of the search were admitted into evidence at trial over the objections of the appellants. Appellants now urge that the fruits of the search were inadmissible for any of several reasons, and that as a result the convictions must be reversed.

Appellants urge first that the warrant was fatally inconsistent with the affidavit upon which it was based. The warrant declared that there was probable cause to believe that betting slips and various other gambling paraphernalia were being concealed at the apartment and were being used in the business of accepting wagers in violation of 26 U. S. C. §§4401, 4411, 4412, and 7272. The first of these sections imposes a federal excise tax on wagering; the second imposes a $50 annual tax on persons accepting wagers; the third requires such persons to register with the district director of internal revenue; and the fourth imposes a $50 penalty on such persons who fail to register. Appellants urge that the only criminal offense mentioned in the warrant is that of not registering, whereas the affidavit of the Special Agent sets forth reasons for believing that the apartment was being used to carry on the business of accepting wagers without payment of the special occupational tax, but does not mention any grounds for believ-

ing that the residents had not registered with the District Director. An unreported case, *United States* v. *Tripodi*, S. D. N. Y., November 14, 1962, 62 Cr. 655, held that just such an inconsistency between an arrest warrant and the complaint on which it was issued presented grounds for the suppression of evidence obtained as a result of the subsequent arrest.

We do not find this apparent inconsistency fatal. The facts set forth in the affidavit indicated reasonable grounds for the belief that appellants had not paid their occupational tax. Payment of the occupational tax accompanies filing of a return on Form 11-C, which is the means prescribed by the Regulations for registering in order to comply with §4412 and to avoid violation of §7272. Regs. §44.4901-1(a), (c). The same information which indicated failure to pay the occupational tax in this case also indicated failure to register, and therefore violation of §7272.

Appellants also challenge the sufficiency of the affidavit upon which the search warrant was issued. The affidavit, given by a special agent of the IRS, set forth the following as indicative of probable cause:

> ". . . Testimony of a Special Agent of the Internal Revenue Service who: (1) placed horse bets by telephoning number TR 9-2265; (2) that investigation has disclosed that the telephone number is installed at Ground Floor Apartment B at 1582 First Avenue, New York, New York; (3) that a search of the records of the Internal Revenue Service reveal that none of the persons residing at the afore-mentioned address have paid the Special Tax imposed by Title 26, United States Code, Section 4411; and (4) that wagers were placed by the Special Agent on January 20, 21, 1964."

The date of the affidavit was January 22, 1964.

Appellants point out that the information relied on is not that of the affiant. However, hearsay may serve as the basis for the issuance of a warrant, if there is reason to believe that the hearsay is reliable. *Rugendorf* v. *United States*, 376 U. S. 528, 533 (1964); *Jones* v. *United States*, 362 U. S. 257 (1960). Here, the declarant was a special agent, and he spoke of things he himself had done in telephone calls to the phone located in the apartment. This seems sufficient indication of the reliability of the information. See *United States* v. *Freeman*, —— F. 2d —— (2d Cir. 1966).

Appellants contend that the affidavit does not indicate various crucial dates and, therefore, does not indicate that probable cause existed on a date close to the date of issuance of the warrant. *Sgro* v. *United States*, 287 U. S. 206 (1932). However, it seems fairly clear from the language of the affidavit that the special agent on whose information the affiant relies placed the bets on January 20 and 21. The use of the article "the" to refer to the special agent described under (4) indicates that the agent intended is the same as the one mentioned at the beginning of the paragraph. Moreover, the use of the present tense in the phrase "a search of the records . . . reveal" [sic] indicates that the search was made at a time close to the time of the giving of the affidavit.

It is true that details of who made the search and the investigation mentioned in (2) and (3) are not given. It is also true that the paragraph is not a paragon of grammar and style. But we must bear in mind the recent comments of the Supreme Court that:

> ". . . affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a com-

> monsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

United States v. *Ventresca,* 380 U. S. 102, 108 (1965). Under the standards of *Ventresca,* the affidavit here was sufficient grounds for issuance of the warrant.

Appellants maintain, however, that even if the allegations constituted probable cause, the evidence underlying those allegations was procured by trespass. It appears that the apartment building had a hall door which was meant to be kept locked and which could be opened only by tenant's keys or buzzes from tenants. There was testimony to the effect that the door was often open, and even if closed, its lock was broken and could be opened by almost any key. Appellants argue that evidence constituting probable cause was obtained only by keeping Apartment B under surveillance from inside the hall door, and that IRS agents entered this protected and semi-private space without the consent of the tenants and, consequently, as trespassers. See *McDonald* v. *United States,* 335 U. S. 451, 458-59 (1948) (Jackson, *J.*, concurring). However, the Supreme Court in *McDonald* did not hold that officials could not peaceably enter common corridors and hallways in a multiple dwelling in the course of a surveillance. In that case, the police gained entrance to the building by climbing in through the landlady's window, and intruded upon the defendant's right

of privacy before arresting him by peering through his transom. More recent cases have indicated that peaceable entry which works a technical trespass is permissible in order to gather evidence indicating probable cause, so long as the trespass does not impinge upon some area protected by the Fourth Amendment. *United States* v. *Buchner,* 164 F. Supp. 836 (D. D. C.), *aff'd per curiam,* 268 F. 2d 891 (D. C. Cir. 1958), *cert. denied,* 359 U. S. 908 (1959); see *United States* v. *St. Clair,* 240 F. Supp. 338 (S. D. N. Y. 1965). This court has recently held that a lobby of an apartment house, guarded by a door usually kept locked, is not within the curtilage of a tenant's apartment, and so is not a protected area within which the individual tenants have Fourth Amendment rights. *United States* v. *Miguel,* 340 F. 2d 812 (2d Cir.), *cert. denied,* 382 U. S. 859 (1965). It follows from *Buchner* and *Miguel* that the peaceable entry here involved, although perhaps a technical trespass, did not vitiate the surveillance evidence tending to establish probable cause.

Finally, appellants urge that the method of execution of the warrant was illegal. On January 22, armed with the warrant, two IRS agents entered the hallway of the apartment building and watched the door of Apartment B from behind the door leading to the cellar. When they saw Conti unlock the door to the apartment, both agents came out. One announced that he was a federal officer with a search warrant and walked past Conti into the apartment while Conti was withdrawing the key from the lock.

Appellants maintain that this conduct was in violation of 18 U. S. C. §3109, which provides that:

> "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after

notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

Appellants contend that "breaking" under this statute must be read broadly to mean any entry without permission, even though the entry does not damage any part of the house, see *Keiningham* v. *United States,* 287 F. 2d 126 (D. C. Cir. 1960).

However, it is clearly established in this circuit that "breaking" in the statute means forcible entry. *United States* v. *Garnes,* 258 F. 2d 530, 533 (2d Cir.), *cert. denied,* 359 U. S. 937 (1958); *United States* v. *Monticallos,* 349 F. 2d 80 (2d Cir. 1965) (agents entered unannounced, following prospective customer for narcotics through open door). The entry here was entirely peaceable.

II. *The Language in the Indictment Charging Both Receiving and Accepting Wagers.*

All five counts against each of the defendants charged them with having been "engaged in the business of accepting wagers and in receiving wagers for and on behalf of a person engaged in the business of accepting wagers. . . ." Appellants urge, as they did below, that the Government should have been required to elect between charging appellants as receivers or as acceptors of wagers.

The statutes differentiate between an "acceptor" of wagers, who is the banker or principal in a wagering operation, and "receivers" of wagers, who take bets as runners or agents for "acceptors," H. R. Rep. No. 586, 82nd Cong. 1st Sess. 56 (1951); Sen. Rep. No. 781, 82nd Cong. 1st Sess. 114 (1951) and courts have held fatal a variance between an indictment charging one form of betting activity, and proof

establishing another. *United States* v. *Pepe,* 198 F. Supp. 226 (D. Del. 1961), *aff'd per curiam,* 339 F. 2d 264 (3d Cir. 1964). However, the same court which affirmed *Pepe* later held that it was not grounds for reversal to charge both "accepting" and "receiving" where the evidence indicated the presence of both activities and where no request for an election had been made at trial. *United States* v. *Manos,* 340 F. 2d 534 (3d Cir. 1965). But cf. *United States* v. *Nicholas,* 224 F. Supp. 310 (W. D. Pa. 1963).

We hold that the indictment was not defective for charging both activities in the conjunctive, even though the defendants requested an election at trial. Charging alternative ways of violating a statute in the conjunctive is permissible, and a conviction under such an indictment will be sustained if the evidence indicates that the statute was violated in any of the ways charged. *Smith* v. *United States,* 234 F. 2d 385 (5th Cir. 1956). This principle applies here. Both the acceptor and the receiver are required to register under §4412 and to pay the occupational tax imposed by §4411. The acceptor is required to pay the excise tax under §4401, and the Regulations make clear that a receiver also is liable under §4401, until he discloses the name of his principal. Reg. §44.4401-2(a)(2). In short, accepting and receiving without registering and paying the taxes imposed by these sections amount, in effect, to different ways of violating the same statutes.

III. *Miscellaneous Conduct and Rulings of the Trial Court.*

Appellants assert they were denied a fair trial as a result of the conduct and rulings of the trial court. They cite several instances, which may be summarized and disposed of briefly.

Appendix A.

The trial court required appellants to choose between making their opening statements immediately after the opening statements of the prosecution, and not making them at all. This seems well within the trial court's broad power to regulate the conduct and timing of a trial, and not prejudicial to the defendants.

The trial court excluded offered testimony of a retired special agent of the IRS, by whose testimony appellants intended to show that the special agents watching from behind the cellar door could not have seen activities at the door of Apartment B. This evidence was of little relevance except as to the existence of probable cause, which had already been established in the preliminary hearing before Judge Weinfeld. Moreover, the testimony would tell the jury nothing it could not deduce by itself from the testimony as to the lay-out of the apartment and the landing.

The trial court declined to hold a new hearing on the admissibility of the fruits of the search, saying that he was content to abide by the results of the hearing before Judge Weinfeld. This was perfectly proper, in the absence of any offer of important new evidence of which appellants were not aware at the time of the preliminary hearing. *United States* v. *Wheeler*, 172 F. Supp. 278 (W. D. Pa. 1959), *aff'd*, 275 F. 2d 94 (3d Cir. 1960); *Waldron* v. *United States*, 219 F. 2d 37 (D. C. Cir. 1954).

The trial court urged throughout that the trial time be held to one week. Appellants do not indicate how they were prejudiced by this insistence. They contend that the court misled them into thinking that requests for charges would be considered timely up to the time of charge. This is simply not so. Nor is it true that the trial court denied them sufficient time to have their handwriting expert examine the exhibits which the Government claimed were in the hand-

writing of the appellants. The appellants had known that this material was in the possession of the Government for months, and knew as of the first day of trial that the Government intended to establish by means of a handwriting expert that the material was written by the appellants.

After the jury had been out for some time, the court called them in to question them as to whether it would be necessary to reserve hotel rooms for them. He called up counsel for a side-bar conference and told them that he intended to ask the jury, not as to how they were thinking, but as to which counts they were in agreement on, one way or the other. Counsel acquiesced, counsel for the appellants apparently in the belief that the trial court would accept the verdict on the last four counts and might dismiss the first count. The jury reported agreement on all counts except as to Count 1 against one defendant. The trial court accepted this as the verdict of the jury. We fail to see how appellants were prejudiced by this procedure.

Finally, in the charge to the jury, the court spoke in passing of the need to demonstrate a greater quantum of willfulness with respect to a felony count than with respect to a misdemeanor count. The language was not dissimilar to that used by the Supreme Court in discussing the same point in *Ingram* v. *United States*, 360 U. S. 672, 676 (1959). Moreover, the charge read as a whole is a fair statement of the different requirements of proof under the different counts.

IV. *Sufficiency of the Evidence on Count 1.*

Conti, the sole appellant convicted under Count 1, urges that the evidence against him was insufficient, since it did not establish willfulness. It is true that there was no evidence which directly indicated that for several months Conti

knew of the existence of the 10% excise tax imposed by §4401 and nevertheless deliberately attempted to evade it. However, Conti's conduct before arrest and his extraordinary behavior at the time of arrest was sufficient to establish the willfulness of his conduct. Conti used a code to conceal the name of bettors. He approached and departed the apartment in a surreptitious fashion. At the time of his arrest, he gave a false name and, when told that he was being arrested for not having the federal tax stamp, he replied that he had not been caught taking bets. He also attempted to discard the keys to the apartment and various odds sheets without attracting the attention of the arresting officers.

V. *The Constitutionality of the Wagering Tax Statutes.*

Appellants make a *pro forma* attack on the constitutionality of the wagering tax statutes "in order . . . to preserve [the argument] for possible review. . . ." We adhere to our recent decision in *United States* v. *Costello*, 352 F. 2d 848 (2d Cir. 1965), *cert. granted*, 34 U. S. L. Week 3317 (Mar. 22, 1966), upholding the constitutionality of these statutes.

VI. *Conclusion.*

The convictions are affirmed.

Waterman, Circuit Judge: I concur in the result.

Appendix B.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of June, one thousand nine hundred and sixty-six.

Present: HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RALPH CONTI and DAVID NEWMAN,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.

Appendix C.

Petition for Rehearing.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

DOCKET NO. 30114

UNITED STATES OF AMERICA,

Appellee,

against

RALPH CONTI and DAVID NEWMAN,

Defendants-Appellants.

PETITION FOR REHEARING BY THE COURT AS CONSTITUTED IN THE ORIGINAL HEARING OR EN BANC, OR IN THE ALTERNATIVE FOR A STAY OF THE MANDATE AND CONTINUANCE OF BAIL PENDING APPLICATION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, Waterman, Moore and Feinberg, Circuit Judges:

The decision affirming the judgment of conviction was rendered June 1, 1966.

Appellants respectfully petition this Honorable Court for a re-hearing of the appeal by the Court as constituted in the original hearing or *en banc,* to submit once again the argued position on the points of the appeal, and particularly to call the Court's attention to the following three items in the first two of which the operative facts

appear to be either incorrectly stated in or omitted from the decision, as the third of which was not referred to in the decision.

(1)

In that part of its decision upholding the legality of the execution of the search warrant (at p. 2155), this Court states:

> "When they saw Conti unlock the door to the apartment, both agents came out. One announced that he was a federal officer with a search warrant and *walked* past Conti into the Apartment while Conti was withdrawing the key from the lock." (Italics added.)

The Government claimed that agent Cotter walked (Gov. brief, p. 13); but, as we pointed out on page 7 of appellants' reply brief, the record is quite clear that agent Cotter did not walk but *rushed as fast as he could* through the open door. See agent Reilly's testimony at pages 105a-106a, and agent Cotter's testimony at page 122a, of defendants-appellants' appendix.

This method of entry by rushing at top speed is not "entirely peaceable" as this Court has labeled it at page 2156 of the decision. This method of entry resembles that which was held illegal in *Hair* v. *U. S.*, 289 F. 2d 894, 897 (D. C. Cir. 1961). We feel that this circumstance ought to persuade the Court to change its ruling on the execution of the search warrant. In any event we submit that the decision should be revised to state the fact precisely.

There is a conflict between the instant decision and the decisions of the District of Columbia Circuit in *Keningham* v. *U. S.*, 287 F. 2d 126, 130 (D. C. Cir. 1960) and *Hair* v. *U. S., supra.* The instant decision departs even from what this Court itself suggested in *U. S.* v. *Price*, 345 F. 2d 256, 259, footnote 6 (C. A. 2, 1963).

Appendix C.

The two prior cases in this circuit cited and relied on in the decision (p. 2156), *United States* v. *Garnes,* 258 F. 2d 530, 533 (C. A. 2, 1958), Cert. Den. 359 F. 2d 937 (1958), and *United States* v. *Monticallos,* 349 F. 2d 80 (C. A. 2, 1965) are not apposite. In *U. S.* v. *Garnes,* a case of a non-warrant, narcotics arrest on probable cause, with incidental search, the question of entry was not considered or even mentioned. *U. S.* v. *Monticallos,* a case of a non-warrant, narcotics arrest on probable cause, with incidental search, simply held (at p. 82) that the question of unlawful entry was not raised below and could not be considered.

Since in the event rehearing is denied, the Supreme Court will be asked to resolve the conflict, we submit that the fact of the manner of entry ought to be clearly stated.

(2)

This Court now holds for the first time that execution of a search warrant commencing with an admitted, albeit, "technical", trepass is permissible. However, the citations relied upon are not applicable to the facts at bar. Those decisions deal only with (i) the *lobby* in a multiple dwelling; *U. S.* v. *Miguel,* 340 F. 2d 812 (C. A. 2), cert. den. 382 U. S. 859 (1965); and (ii) the hallways in a multiple dwelling leading *directly* to the apartment in question; *U. S.* v. *Buchner,* 164 F. Supp. 836 (D.D.C.), aff'd per curiam 268 F. 2d 891 (D. C. Cir. 1958), cert. den. 359 U. S. 908 (1959), and *U. S.* v. *St. Clair,* 240 F. Supp. 338 (S.D.N.Y. 1965).

The result in such decisions might be justified by necessity since otherwise the apartments in multiple dwellings could be turned into a modern form of medieval sanctuary against arrest or search. However, we submit it would be far better to hold forthrightly that, of necessity, there can be no trespass upon a lobby or a hall which is open to

multiple tenants, their invitees, their landlord's maintenance men, etc., than to validate a search on the basis of an illegal act even if it is called a "technical" trespass. But, in any event, here the agents went far beyond the necessities of the search warrant. At the most, the warrant permitted them to go through the outside doors into the hallway and through the hallway directly to Apartment B in order to search it. They departed from that course. They opened the doorway to a flight of stairs leading down to the cellar. This doorway was kept locked, and was not accessible even to tenants (151a, 152a). The agents went in upon the stairway landing and hid behind the door. This was clear trespass, and not "technical" at all. No case cited in the decision, and no case that we are aware of, has attempted to justify such an action.

This Court now declare such trespasses permissible. This may be the opening of Pandora's box. We submit the Court should reconsider its decision. In the event it adheres to its present decision, we feel the Court should state the complete facts. As the decision now reads, these facts of record are not made clear and the reader of the decision is left to suppose that only the "semi-public" lobby and hallway to the subject apartment are involved.

What the Court has decided on this point is at variance with what the Supreme Court, by Mr. Justice Jackson, said in *McDonald* v. *U. S.*, 335 U. S. 451, 458-59 (1948). In the event this motion is denied, the Supreme Court will be asked to define the applicable law.

(3)

The decision completely omits any consideration of our argument that the execution of the search warrant was illegal because 18 U.S.C. § 3109 was not complied with. Admittedly, agent Cotter did not wait a reasonable time,

or any time at all, between announcing his presence and purpose, and entering. He rushed in as fast as he could (105a, 106a, 122a). See *U. S.* v. *West* 328 F. 2d 16, 18 (C. A. 2, 1964); *Masiello* v. *U. S.*, 317 F. 2d 121 (Cir. D. C. 1963).

The open door gave no authority to the agents to disregard the Congressional mandate of § 3109. *U. S.* v. *Price,* 345 F. 2d 256, 259, footnote 6 (C. A. 2, 1963).

As to Staying the Mandate and Continuing Bail Pending Application for Certiorari to the Supreme Court

In the event this Court should deny rehearing, appellants intend to present to the United States Supreme Court a petition for a writ of certiorari to review the determination of this Court. It is respectfully prayed that the mandate of this Court be stayed until the determination of said petition so to be filed, and that pending such determination the appellants be continued on bail.

Five Questions to Be Presented in a Petition for Certiorari

The three issues above discussed as well as the other points of the original brief are, it is submitted, of sufficient substantiality to require a review by the United States Supreme Court.

In addition to the three points heretofore discussed, the Court is aware (decision, p. 2160) that, among others, precisely the same issue is involved in this case as had been granted certiorari by the Supreme Court in *United States* v. *Costello,* 352 F. 2d 848 (C. A. 2, 1965) cert. granted 34 United States Law Week 3317 (March 22, 1966). We have inquired of counsel in the *Costello* case respecting its present status and have been advised that the appellants'

briefs will be filed some time during the summer. Accordingly, that case will not be heard by the Supreme Court until some time after the opening of the October 1966 term of the Court.

It seems reasonable to think that the Supreme Court on a petition for certiorari in the instant case will grant the petition at least so far as concerns the constitutionality of the Federal Wagering Statutes, and will decide the appeal thereon along with that in *Costello*.

Further, we shall ask the Supreme Court to grant certiorari on the question whether the decision herein or that in *U. S.* v. *Tripodi*, S.D.N.Y. 11/14/62, unreported, correctly states the law, where the warrant and the complaint are inconsistent. This Court now holds that the failure to register may be inferred from information showing failure to pay the tax. *Tripodi* holds that it may not, and *Sgro* v. *U. S.*, 287 U. S. 206, 210, 53 S. Ct. 138, 140 (1932), appears to sustain *Tripodi* and preclude making the determination by *inference* from the failure to pay the tax that there has been a failure to register.

Finally, the Supreme Court will be asked to pass on the sufficiency of the affidavit for warrant where admittedly the sources of items 2 and 3 in the affidavit are not given and it is clear that they are hearsay. *U. S.* v. *Ventresca*, 380 U. S. 102 (1965), the only authority cited on this point in the decision, does not justify the finding of sufficiency.

The five questions above referred to are, we submit, important enough to be reheard by this Court *en banc*.

Defendant Conti was sentenced to five concurrent one-year terms, and fines aggregating $9,000.

Defendant Newman, who was found guilty on only the last four (misdemeanor) counts of the indictment, was

sentenced to four concurrent three-month terms and fines aggregating $1,000.

The defendant Conti is at liberty on bail of $10,000, and defendant Newman is at liberty on bail at $3,500.

Both defendants have always been available whenever their presence was required.

Defendant Conti is a married man, father of three children and a grandfather, living with his wife in their own home at Nine Mulberry Road, Briarcliff, New York. Defendant Newman is father of a married daughter and resides at 61-15 98th Street, Rego Park, Queens, N.Y.C.

In view of the foregoing facts we respectfully submit that the mandate be stayed and bail be continued pending determination of the certiorari proceedings.

No prior application for the relief prayed for herein has been made.

For the reasons set forth this petition for rehearing or in the alternative, for a stay of the mandate and a continuance of bail, should be granted.

Respectfully submitted,

Dorsey, Burke & Griffin,
Attorneys for Appellant Conti,
44 Wall Street,
New York, New York 10005.

Irwin Klein,
Attorney for Appellant Newman,
2 Park Avenue,
New York, New York.

Appendix C.

CERTIFICATE.

I, WILLIAM T. GRIFFIN, certify that I am a member of the firm of DORSEY, BURKE & GRIFFIN, attorneys for the appellant Conti in this cause; that I am of counsel for both appellants; that I make this certificate in compliance with the rules of this Court; that in my judgment the within and foregoing petition is well founded and is not frivolous or interposed for delay.

WILLIAM T. GRIFFIN.

Dated: June 13, 1966.

Appendix D.

Orders Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA,

Appellee,

v.

RALPH CONTI and DAVID NEWMAN,

Appellants.

PETITION FOR REHEARING IN BANC.

DORSEY, BURKE & GRIFFIN, New York, N. Y., for appellant Ralph Conti.

IRWIN KLEIN, New York, N. Y., for appellant David Newman.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

28 June 1966

Appendix D.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA,

Appellee,

v.

RALPH CONTI and DAVID NEWMAN,

Appellants.

Petition for rehearing by the court as constituted in the original hearing or en banc, or in the alternative for a stay of the mandate and continuance of bail pending application for a writ of certiorari.

DORSEY, BURKE & GRIFFIN, New York, N. Y., for Appellant Ralph Conti.

IRWIN KLEIN, New York, N. Y., for Appellant David Newman.

Petition for rehearing denied.

Mandate is stayed and appellants admission to bail continues, all pending application to U. S. Supreme Court for a writ of certiorari which stay and continuance of bail is condtioned upon strict compliance with the 30 day time limt contained in Rule 28(c) of this Court.

S. R. W.,
L. P. M.,

W. F.,
U. S. C. JJ.

June 28, 1966.

Appendix E.

Constitution of the United States.

CONSTITUTION OF THE UNITED STATES
AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. . . .

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

In pertinent part:

"• • • nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

Statutes and Regulations Involved.

Title 18, United States Code

§ 3109. *Breaking doors or windows for entry or exit.*

The officer may break open any outer or inner window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Appendix E

Title 26, United States Code

§ 4401. *Imposition of tax*

(a) *Wagers.*—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) *Amount of wager.*—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) *Persons liable for tax.*—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

§ 4411. *Imposition of tax*

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

§ 4412. *Registration*

(a) *Requirement.*—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) *Firm or company.*—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) *Supplemental information.*—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

§ 7201. *Attempt to evade or defeat tax*

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

§ 7203. *Willful failure to file return, supply information, or pay tax*

Any person required under this title to pay any estimated tax or tax, or required by this title or by

regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

§ 7262. *Violation of occupational tax laws relating to wagering—Failure to pay special tax*

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

§ 7272. *Penalty for failure to register*

(a) *In general.*—Any person who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50.

FEDERAL TAX REGULATIONS

§ 44.4901-1 *Payment of special tax*

(a) *Condition precedent to carrying on business.* No person shall engage in the business of accepting wagers subject to the tax imposed by section 4401 until he has filed a return on Form 11-C and paid the special tax imposed by section 4411. Likewise, no person shall engage in receiving wagers for or on behalf of

any person engaged in the business of accepting wagers until he has filed a return on Form 11-C and paid the special tax imposed by section 4411. For provisions relating to the tax imposed by section 4411, see Subparts B and C of this part, respectively.

• • •

(c) *Tax payment evidenced by special tax stamp.* (1) Upon receipt of a return on Form 11-C, together with remittance of the full amount of tax due, the district director will issue a special tax stamp as evidence of payment of the special tax.

§ 44.4412-1 *Registration*

(a) *In general.* Every person required to pay the special tax imposed by section 4411 shall register and file a return on Form 11-C. For provisions relating to the general requirement for filing a return, see § 44.6011(a)-1.

§ 44.6071-1 *Time for filing return*

(a) *Return on Form 730.* Each return required to be made on Form 730 pursuant to § 44.6011(a)-1 shall be filed on or before the last day of the first calendar month following the period for which it is made. . . .

(b) *Return on Form 11-C.* (1) The first return required to be made on Form 11-C shall be filed to cover the period beginning with the first day of the calendar month in which a person engages (or expects to engage) in activities which make him liable for the special tax imposed by section 4411 and ending with the following June 30. Thereafter, each return required to be made on Form 11-C shall be filed on or before July 1 to cover a 1-year period (beginning July 1 and ending June 30 of the following calendar year) during which taxable activity continues.

§ 44.6091-1 *Place for filing returns*

(a) *In general.* A return on Form 730 or Form 11-C shall be filed with the district director of internal revenue for the district in which is located the legal residence or principal place of business of the person making the return. . . .

§ 44.6151-1 *Time and place for paying taxes*

The taxes imposed by sections 4401 and 4411 shall, without assessment or notice and demand, be paid to the internal revenue officer with whom the returns are required to be filed at the time fixed for filing the returns. . . .

Federal Rules of Criminal Procedure.

Rule 41 (e) Motions for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the District Court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that . . . (2) the warrant is insufficient on its face . . . or (5) the warrant was illegally executed.

New York Penal Law.

§ 973. *Keeping gaming and betting establishments.*

Any corporation or association or the officers thereof or any co-partnership or individual, who keeps a room, shed, tent, tenement, booth, building, float or vessel, or any other enclosure or place, or any part thereof, used for gambling, or for any purpose or in any man-

ner forbidden by this article, or for making any wagers or bets made to depend upon any lot, chance, casualty, unknown or contingent event or on the future price of stocks, bonds, securities, commodities or property of any description whatever or for making any contract for or on account of any money, property or thing in action, so bet or wagered, or being the owner or agent, knowingly lets or permits the same to be so used, is guilty of a misdemeanor. This section shall not be extended so as to prohibit or in any manner affect any insurance made in good faith for the security or indemnity of the party insured and which is not otherwise prohibited by law, nor to any contract on bottomry or respondentia. As amended L. 1910, c. 487, eff. Sept. 1, 1910.

§ 986. *Pool-selling, book-making, bets and wagers, et cetera.*

Any person who engages in pool-selling, or book-making with or without writing at any time or place; or any person who keeps or occupies any room, shed, tenement, tent, booth or building, float or vessel, or any part thereof, or who occupies any place, or stand of any kind, upon any public or private grounds within this state with books, papers, apparatus or paraphernalia, for the purpose of recording or registering bets or wagers, or of selling pools, and any person who records or registers bets or wagers or sells pools or makes book, with or without writing, upon the result of any trial or contest of skill, speed or power of endurance of man or beast, or upon the result of any political nomination, appointment or election; or upon the result of any lot, chance, casualty, unknown or contingent event whatsoever; or any person who receives, registers, records or forwards or purports or

pretends to receive, register, record or forward in any manner whatsoever, any money, thing or consideration of value, bet or wagered, or offered for the purpose of being bet or wagered, by or for any other person, or sells pools, upon any such result; or any person who, being the owner, lessee or occupant of any room, shed, tenement, tent, booth or building, float or vessel, or part thereof, or of any grounds within this state, knowingly permits the same to be used or occupied for any of these purposes, or therein keeps, exhibits or employs any device or apparatus for the purpose of recording or registering such bets or wagers, or the selling of such pools, or becomes the custodian or depositary for gain, hire or reward, of any money, property or thing of value, staked, wagered or pledged, or to be wagered or pledged upon any such result; or any person who aids, assists or abets in any manner in any of the said acts, which are hereby forbidden, is guilty of a misdemeanor, except when another penalty is provided by law. When an exclusive penalty is elsewhere provided by law for an act hereby prohibited, the permitting of the use of premises for the doing of the act in such case shall not be deemed a violation hereof, nor of section nine hundred and seventy-three of the penal law. As amended L. 1910, c. 488; L. 1934, c. 233, § 4; L. 1937, c. 696, eff. Sept. 1, 1937.

§ 986-c. *Book-making as a felony.*

Any person engaged in book-making to the extent that he receives or accepts in any one day more than five bets or wagers upon the result of any trials or contests of skill, speed or power of endurance of man or beast or upon the result of any political nomina-

tion, appointment or election, or upon any lot, chance, casualty, unknown or contingent event whatsoever, which bets or wagers shall be of such size that the total of the amounts of money paid or promised to be paid to such bookmaker on account thereof shall exceed five thousand dollars, shall be guilty of a felony punishable by imprisonment for a term not exceeding five years. Added L. 1960, c. 548, § 2, eff. Sept. 1, 1960.

Appendix F.

Defendant's Motions.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 65 Crim. 263

UNITED STATES OF AMERICA,

against

RALPH CONTI and DAVID NEWMAN,

Defendants.

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* * * * * *

2. Defendants move for arrest of judgment on the following grounds:

(a) None of the counts in the indictment charge an offense;

(b) The federal gambling statutes on which the indictment is based are unconstitutional as an infringement of the police power reserved to the States, as a violation of the privilege against self-incrimination, and as vague and arbitrary and contrary to the guarantees of the Fifth Amendment.

* * * * * *

DATED: New York, New York, September 15, 1965.

DORSEY, BURKE & GRIFFIN,
Attorneys for Defendant, Ralph Conti.

IRWIN KLEIN,
Attorney for Defendant, David Newman.